

HOUSE BILL REPORT

ESHB 1114

As Passed House:

March 6, 2007

Title: An act relating to marketing of estate distribution documents.

Brief Description: Prohibiting the marketing of estate distribution documents by persons not authorized to practice law in this state or who are not a financial institution.

Sponsors: By House Committee on Judiciary (originally sponsored by Representatives Rodne, Lantz, Moeller and B. Sullivan; by request of Attorney General).

Brief History:

Committee Activity:

Judiciary: 1/19/07, 2/13/07 [DPS].

Floor Activity:

Passed House: 3/6/07, 97-0.

Brief Summary of Engrossed Substitute Bill

- Makes the marketing of wills, trusts, and related documents, other than certain payable on death accounts, unlawful unless done by someone who is authorized to practice law.
- Makes the unlawful marketing of estate distribution documents a violation of the Consumer Protection Act.
- Exempts financial institutions.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Bill Perry (786-7123).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

The practice of law as construed by Washington courts includes not only legal representation of a client in court, but also legal advice and counsel as well as the preparation of legal instruments and contracts by which legal rights are secured. (See, *e.g.*, Andersen v. Northwest Bonded Escrows, 4 Wn. App. 754 (1971).) Controversy and concern have arisen over the preparation and marketing of various documents, such as wills and trusts, that relate to the disposition of a person's property. In some instances, such documents may be prepared and marketed by persons who are not members of the State Bar Association.

Various statutes, common law doctrines, and court rules deal with the unlawful, unauthorized, or negligent practice of law. The Washington Supreme Court has declared that under Article IV of the State Constitution, regulation of the practice of law is an area restricted exclusively to the judicial branch. Bennion v. Kassler Escrow, 96 Wn.2d 443 (1981), for example, invalidated a statutory attempt to allow the limited practice of law by escrow agents and others. (See the discussion on court rules below.) Although several of its provisions may be of doubtful validity, the State Bar Act remains a part of the state's statutory law, and one of its sections makes it a crime to practice law in this state without being a member of the bar.

The Crime of Unlawful Practice of Law.

The State Bar Act makes the "unlawful practice of law" a crime. One way in which the crime is committed is for a nonlawyer to practice law or hold himself or herself out as entitled to practice law or to share legal fees with a lawyer. "Nonlawyers," for purposes of this statute, include anyone not an active member in good standing of the State Bar Association. Committing the crime of unlawful practice for the first time is a gross misdemeanor, punishable by up to one year in jail and a fine of up to \$5,000. Any subsequent violation is a class C felony, punishable by up to five years in prison and a fine of up to \$10,000.

Court Rules - Admission - Discipline - Limited Practice.

Court rules on the practice of law regulate admission to the bar and allow for discipline and disbarment of members, but do not directly regulate or discipline nonlawyers. Court rules do, however, provide for the "limited practice" of law by nonlawyers in one area. The court rules authorize certain certified nonlawyers to select, prepare, and complete legal documents incident to the closing of real estate and personal property transactions.

Civil Actions for Negligence and Equitable Relief.

The common law, as well as the same statute that creates the crime of unlawful practice, recognizes a civil cause of action based in negligence for harm done by the unauthorized practice of law. Injunctive and other equitable relief is also available, as are contempt proceedings. The unlawful practice statute also declares that the unlawful practice of law by a person who is licensed in another business or profession may be grounds for discipline as unprofessional conduct in that business or profession. An action may be brought by a prosecuting attorney for an injunction and a civil penalty of up to \$5,000 for each violation of the unlawful practice statute.

The Consumer Protection Act.

Under the state's Consumer Protection Act (CPA), certain activities have been designated by the Legislature as unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. Various remedies for violations of the CPA are provided, including authorization for the Attorney General to seek restraining orders. A person who is injured by a violation of the CPA may recover treble damages, costs, and reasonable attorneys' fees.

Summary of Engrossed Substitute Bill:

It is unlawful for anyone who is not authorized to practice law in this state to market estate distribution documents in or from the state. The unauthorized marketing of such documents is also a violation of the CPA.

"Estate distribution documents" are documents such as wills or trusts that have either been prepared for a specific person or have been prepared as marketing materials. Such documents do not include payable on death accounts in a financial institution. Marketing includes an offer or agreement to prepare or provide individualized advice about an estate distribution document.

A person who is *not* authorized to practice law in this state may nonetheless gather information or assist in preparing estate distribution documents if:

- he or she is employed by someone who *is* authorized to practice law in this state; and
- he or she does not provide legal advice.

The act does not apply to financial institutions.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) Estate distribution documents such as living trusts are being marketed by people without the necessary training or knowledge. These documents are sometimes marketed to senior citizens merely as a way to enter the home, where worthless or fraudulent products are sold once the senior's trust has been gained. The bill will not prevent the legitimate preparation of living trusts or other documents, or the use of forms. The bill makes clear what a violation of the law is and creates a per se violation of the Consumer Protection Act.

(Opposed) None.

Persons Testifying: Representative Rodne, prime sponsor; and Cheryl Kringle, Office of the Attorney General.

Persons Signed In To Testify But Not Testifying: None.